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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/561,946	06/06/2006	Seiji Hosokawa	YAMAP0998US	3079
43076 7590 12/11/2009 MARK D. SARALINO (GENERAL) RENNER, OTTO, BOISSELLE & SKLAR, LLP 1621 EUCLID AVENUE, NINETEENTH FLOOR CLEVELAND, OH 44115-2191				
EXAMINER				
GWARTNEY, ELIZABETH A				
ART UNIT		PAPER NUMBER		
1794				
MAIL DATE		DELIVERY MODE		
12/11/2009		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/561,946

Applicant(s)

HOSOKAWA, SEIJI

Examiner

Elizabeth Gwartney

Art Unit

1794

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 05 October 2009.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-8 and 10-17 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-8 and 10-17 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SI.08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 10/02/2009 has been entered.
2. Claims 1-8 and 10-17 are pending in this application.
3. Note, the inventors name for prior art reference JP 09-149757 has been corrected to read "Nakajima" rather than "Hiroko."

Claim Rejections - 35 USC § 112

4. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

5. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

6. Claims 1-8 and 10-17 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

Regarding claims 1 and 16, while there is support in the specification for a baked snack wherein there is no blister formation (p.43/L 1-3/Example 1, p.44/L10-12/Example 2), there is no support for a baked snack with no hole.

Further, negative limitations in a claim which do not appear in the specification as filed introduce new concepts and violate the description requirement of 35 USC 112, first paragraph, *Ex Parte Grasselli, Suresh, and Miller*, 231 USPQ 393, 394 (Bd. Pat. App. and Inter. 1983); 783 F. 2d 453.

7. Claims 1-8 and 10-17 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Regarding claims 1 and 16, the recitation “wherein the baked snack has no hole” renders the claims indefinite. Since the hollow part of a stick shaped baked snack is a hole, it is unclear how a baked snack having a hollow stick shape can have no hole.

Claim Rejections - 35 USC § 103

8. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

9. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

10. Claims 1-8 and 10-17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hosokawa (JP 2001-275552 – Patent Abstract and Machine Translation) in view of Nakajima (JP 09-149757 – Abstract only).

Regarding claim 1-2 and 5-6, Hosokawa discloses a hollow stick-like pretzel obtained by baking dough, extruded to have a hollow stick shape, containing a pregelatinized flour and cornmeal (i.e. cereal flour-[0026]) (Abstract, [0014], [0019], [0072]).

While Hosokawa disclose cornmeal (i.e. corn flour) the reference does not explicitly disclose that the non-gelatinized flour comprises roasted wheat flour.

Nakajima teaches a biscuit dough comprising wheat flour and a roasted wheat flour (Abstract). Nakajima teaches that the roasted wheat flour gives the biscuit good solubility in the mouth and crispy texture (Abstract).

Hosokawa and Nakajima are combinable because they are concerned with the same field of endeavor, namely, baked snack food comprising flour. It would have been obvious to one of ordinary skill in the art at the time of the invention to have used roasted wheat flour, as taught by Nakajima, to replace all or part of the cereal flour in the baked hollow stick shaped pretzel dough

of Hosokawa for the purpose of making a product with good solubility in the mouth and crispy texture.

Further, given Hosokawa discloses cornmeal (i.e. cereal flour including rye flour and corn flour), since Nakajima teaches a wheat flour free of gluten (i.e. roasted wheat flour), using roasted wheat flour to replace cornmeal would amount to nothing more than the use of a known flour free of gluten activity for its intended use in a known environment to accomplish entirely expected results.

Given modified Hosokawa disclose a baked snack having a hollow stick shape obtained by baking dough having a composition identical to that presently claimed, it is clear that the resulting baked snack would intrinsically have no active gluten, i.e. 5 weight % or less, a moisture content of 5 weight % or less and have no hole.

Regarding claims 3-4, Hosokawa discloses all of the claim limitations as set forth above. Further, Hosokawa discloses that the weight ration of non-gelatinized flour (i.e. cereal flour) to gelatinized flour ranges from about 67:43 to about 1:99 (*see* 100 parts cornmeal (i.e. cereal flour and 1-50 parts gelatinized flour- [0020], [Claim 2]).

Regarding claims 7-8, Hosokawa discloses all of the claim limitations as set forth above and that the gelatinized flour includes wheat flour (i.e. cereal flour - Abstract).

Regarding claim 10, Hosokawa discloses all of the claim limitations as set forth above and that the dough includes: about 1 to about 67 parts by weight of sugars (i.e. saccharides) and about 1 to 33 parts by weight of oils and fat with respect to a total 100 parts by weight of the non-gelatinized flour and the gelatinized flour (***note:*** Hosokawa discloses sugar and oil/fat with

respect to 100 parts non-gelatinized flour or cornmeal, therefore, the quantities given above are adjusted to account for both the non-gelatinized flour and gelatinized flour - [0034]-[0038]).

Regarding claim 11, Hosokawa discloses all of the claim limitations as set forth above. While Hosokawa discloses sub-materials (i.e. taste providing material) including egg, salt, spice, and chemical seasoning ([0043]), the reference does not explicitly disclose a baked snack with 10 to 30 parts by weight of taste providing material with respect to the total 100 parts by weight of non-gelatinized flour and the gelatinized flour. As flavor intensity and character are variables that can be modified, among others, by adjusting the amount of taste providing material in the dough composition, the precise amount of taste providing material would have been considered a result effective variable by one of ordinary skill in the art at the time of the invention. As such, without showing unexpected results, the claimed amount of taste providing material cannot be considered critical. Accordingly, one of ordinary skill in the art at the time the invention was made would have optimized, by routine techniques, the amount of taste providing material in the dough composition of Hosokawa to obtain the desired flavor character and intensity in the baked snack (*In re Boesch*, 617 F.2d. 272, 205 USPQ 215 (CCPA 1980)), since it has been held that where the general conditions of the claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. (*In re Aller*, 105 USPQ 223).

Regarding claim 12, Hosokawa discloses all of the claim limitations as set forth above. Given that Hosokawa disclose sub-materials (i.e. taste providing materials) broadly, since cocoa powder is a well known flavoring in baked products (i.e. taste providing material), it would have been obvious to one of ordinary skill in the art at the time of the invention to have chosen a sub-

material, based on flavor preferences, including cocoa powder, and arrive at the current invention.

Regarding claims 13-14, Hosokawa discloses all of the claim limitations as set forth above and that the outer diameter of the baked snack is 15 mm or less ([0063]), and an inner diameter thereof is 40% or more of the outer diameter ([0064]). Further, Hosokawa discloses that the thickness of the baked snack is 2.5 mm or less in at least a part thereof ([0057]-[0061]).

Regarding claim 15, Hosokawa discloses all of the claim limitations as set forth above and that the inside of the hollow stick shaped baked snack is filled with a gustatory agent (i.e. filling material ([0074]-[0076], [0091], [0108])).

Regarding claims 16-17, Hosokawa discloses a method of making a baked snack comprising the steps of: (a) mixing non-gelatinized flour (i.e. cornmeal/corn flour) and gelatinized flour to obtain a mixed dough ([0044]); (b) extruding the mixed dough via a nozzle into a hollow stick shape to obtain a shaped dough ([0046]-[0048]); and (c) baking the shaped dough to obtain the baked snack having the hollow stick shape (*see* calcination [0014], [0072]). Further, Hosokawa discloses a step of injecting a gustatory agent (i.e. filling material) into the inside of the hollow stick shaped baked snack via an open end of the baked snack ([0074]-[0076]).

While Hosokawa disclose cornmeal (i.e. corn flour) the reference does not explicitly disclose that the non-gelatinized flour comprises roasted wheat flour.

Nakajima teaches a biscuit dough comprising wheat flour and a roasted wheat flour (Abstract). Nakajima teaches that the roasted wheat flour gives the biscuit good solubility in the mouth and crispy texture (Abstract).

Hosokawa and Nakajima are combinable because they are concerned with the same field of endeavor, namely, baked snack food comprising flour. It would have been obvious to one of ordinary skill in the art at the time of the invention to have used roasted wheat flour, as taught by Nakajima, to replace all or part of the cereal flour in the baked hollow stick shaped pretzel dough of Hosokawa for the purpose of making a product with good solubility in the mouth and crispy texture.

Further, given Hosokawa discloses cornmeal (i.e. cereal flour including rye flour and corn flour), since Nakajima teaches a wheat flour free of gluten (i.e. roasted wheat flour), using roasted wheat flour to replace cornmeal would amount to nothing more than the use of a known flour free of gluten activity for its intended use in a known environment to accomplish entirely expected results.

Given modified Hosokawa disclose a baked snack having a hollow stick shape obtained by baking dough having a composition identical to that presently claimed, it is clear that the resulting baked snack would intrinsically have no active gluten, i.e. 5 weight % or less, and have no hole.

Response to Arguments

11. Applicant's arguments filed 10/02/2009 have been fully considered but they are not persuasive.

Applicants find that Hosokawa teaches that "active gluten is usually needed in order to obtain dough that is well stretched and elastic enough to remain in one piece" ([0079]). Further, applicants find that "those skill in the art would understand that dough of corn flour or rye flour

would not be well stretched and elastic enough to remain in one piece and would generate holes in the dough.

While Hosokawa teaches that "active gluten" is important to producing dough that is stretched and elastic enough to remain in one piece, Hosokawa teaches a dough composition comprising essentially no active gluten, i.e. pregelatinized wheat flour and commel (i.e. corn flour) that is capable of being formed into a hollow stick shape that is maintained ([0080]- partial translation provided by applicant).

Applicants explain that "from Tables 1 and 2 of Hiroka (translation previously provided by Applicants), it can be understood that a higher amount of roasted wheat flour formulated results in a lower elasticity of the mixed dough, and that when 100% roasted wheat flour is used the resultant mixed dough became crumbled." Applicants find that the crumbled dough is not well stretched or elastic enough to remain in one piece and that holes re generated in the dough. Thus applicants conclude, if roasted wheat flour were used in Hosokawa, the resultant dough would not be well stretched or elastic enough to remain in one piece and would comprise holes.

However, given Hosokawa discloses a dough composition comprising a flour with no active gluten (i.e. corn flour, rye flour) and pre-gelatinized flour wherein the dough is formed into a hollow stick, absent evidence to the contrary, it would have been obvious to one of ordinary skill in the art at the time of the invention to have replaced gluten-free flour (i.e. flour with no active gluten) with another gluten-free flour, such as roasted what flour, with the expectation that the dough would display similar properties. Further, there is nothing in the claim that requires that the dough be well stretched or elastic, but rather, the claim requires dough that can be formed into a hollow stick shape with no hole.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Elizabeth Gwartney whose telephone number is (571) 270-3874. The examiner can normally be reached on Monday - Friday; 7:30AM - 3:30PM EST..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/E. G./

Examiner, Art Unit 1794

/Keith D. Hendricks/

Supervisory Patent Examiner, Art Unit 1794